IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2485 OF 1992

1. Ali Ahmed M.Khan]
]
2. Mrs.Safdari Begum Ali]
Ahmed Khan]
Both Indian Inhabitants of]
Bombay Partners of the firm]
M/s.A.A.Khan & Co. having]
their office at shop No.3, 18]
Balamia Lane, 737, Taherabad]
Mahim, Bombay-400016]..Petitioners

Vs.

1. The Municipal Corporation of]
Greater Bombay established]
under the Bombay Municipal]
Corporation Act, having its]
office at Mahapalika Marg,]
Bombay-400001]
]
2 Mrs.Khairunisa A.Sattar]
2(a) Mansoor Ahmed Shaikh]
2(b) Jabbar Shaikh Mohd.]
Both inhabitants of Bombay]
residing at Room No.1,]
Mohd. Sarai Wadi, Balamia]
Lane, Final Plot No.741,]
T.P.S.III Mahim, Bombay-]
400016]
]
3. Atmohammed Hassan]
3(a) Famida d/o Atta Mohamed]
Indian Inhabitant of Bombay]
residing at Room No.2, Mohd.]
Sarai Wadi, Balamia Lane]
Final Plot No.741, TPS III]
Mahim, Bombay-400016]
]
4. Navisher Nawabali Khan]
Indian Inhabitant of Bombay]

residing at Room No.3, Mohd. Sarai Wadai, Balamia Lane, Final Plot No.741, T.P.S.III Mahim, Bombay-400016

5. Gulam Dastagir Indian Inhabitant of Bombay residing at Room No.4, Mohammed Sarai Wadi, Balamia Lane, Final Plot No.741, T.P.S.III, Mahim, Bombay-400016

6. Dargahi Shaikh Indian Inhabitnat of Bombay, residing at Room No.5, Mohammed Sarai Wadi, Balamia Lane, Final Plot No.741, T.P.S.III, Mahim, Bombay-400016

6(a) Mrs.Mehrunissa Hameedali

7. Mrs.Zaibunisa Nawab Jan Indian Inhabitant, residing at Room No.6, MOhammed Sarai Wadi Balamia Lane, Final Plot No.741 T.P.S.III, Mahim, Bombay-400016

8. Mrs.Sabira Rafiq Ajmeri, Indian Inhabitant of Bombay residing at Room NO.7/8, Mohammed Sarai Wadi, Balamia Lane, Final Plot No.741, T.P.S.III, Mahim, Bombay-400016

8(a) Javed Ajmeri

8(b) Atik Ajmeri

9. Mrs.Sulekha Abdul Hamid, Indian Inhabitant of Bombay residing at Room No.9, Mohammed Sarai Wadi, Balamia Lane, Final Plot No.741, T.P.S.III, Mahim, Bombay-400016

10. Mrs.Fatimabee Mohammed Gouse Indian Inhabitant of Bombay residing at Room No.10, Mohammed Sarai Wadi,

Balamia Lane, Final Plot
No.741, T.P.S.III, Mahim,
Bombay-400016

10(a)Mohd.Aslam Sheikh

11. Camil Fernandes
Indian Inhabitant of Bombay
residing at Room No.11,
Mohammed Sarai Wadi,
Balamia Lane, Final Plot
No.741, T.P.S.III, Mahim,
Bombay-400016

11(a)Francis Fernandes

12. Shafiquallah Khan,
Indian Inhabitant of Bombay
residing at Room No.12,
Mohammed Sarai Wadi,
Balamia Lane, Final Plot
No.741, T.P.S.III, Mahim,
Bombay-400016

13. Sebastian Fernandes

14. Shaikh Abdul Rehman

15. Mohamed Arif Md.Gaus

16. Nawab Jaan Saabu Saab

17. Umar Ebrahim Shaikh

18. Mohd.Iqbal Shaikh

19. Shafique Khan Dastagir
13 to 19 residing at
Mohammed Sarai Wadi,
Balamia Lane, Final Plot
No.741, T.P.S.III, Mahim,
Bombay-400016

..Respondents

....

Ms.N.Z.Khapre Adv.for Petitioner
Mrs.A.K.Savla Adv.for Respondent No.1
Mr.V.R.Tripathi Adv.for Respondent Nos.3 to 19

Mr.A.S.Khandeparkar Adv.for Respondent No.2

....

CORAM: F.I.REBELLO AND
SMT.V.K.TAHILRAMANI,JJ.
DATE : AUGUST 11, 2006

ORAL JUDGMENT(PER SMT.V.K.TAHILRAMANI,J.):

1. The petitioners seek to invoke our extra ordinary powers under Article 226 of the Constitution of India seeking directions to Respondent-Bombay Municipal Corporation by writ of mandamus or an order in the like nature to hand over Final Plot no.741 of Bombay City No.III (Mahim area) Ist Variation (Final) to the petitioners free from any encumbrances.

2. Brief history of the subject plot is required to be stated, which is as follows:-

. One Mr.Gulam Mohammed Abdul Karim and his wife Jaitunbee were the owners of original Plot No.68 at Mahim. The Respondent-Corporation framed Town Planning Scheme known as "Bombay City No.III (Mahim Area)" referred to as Town Planning Scheme under

the Bombay Town Planning Act, 1954 and plot no.68 was reserved for public purpose as per Notification dated 24.8.1960 issued by the Urban Development and Public Health Department. The said Notification was effective from 1st March, 1961. In view of the reservation the said owners of plot no.68 came to be allotted final Plot No.741 by way of exchange. The said plot was located at Balamia Lane, Mahim and it admeasured 450 sq. yards (396.26 sq.mts).

3. It is alleged that on the final plot No.741, there existed a temporary structure known as Mohammed Sarai Wadi which was occupied by some individuals. It appears that on 31.1.1964, the Assistant Engineer (Town Planning) of Respondent No.1-Corporation, promised the original owners to evict the tenants. The Bombay Town Planning Act, 1964 was repealed and it was substituted by Maharashtra Regional Town Planning Act, 1966. The Respondent No.1 issued notices under Section 89 of the said Act to the occupants for their eviction from Final Plot No.741 on 24.9.1981 and the said notices were replied by the occupants on 12.11.1981 whereby they requested for alternate accommodation. Consequently, Respondent No.1 on 3.12.1982 informed

the learned advocate for the original owners that occupants would have to be provided with alternate accommodation for taking over the possession of Final Plot No.741 free from any encumbrances.

4. The present petitioners claim to have purchased Final Plot No.741 (Suit Plot) from the original owners by Deed of Conveyance dated 29.9.1983. About two years later i.e. on 22.8.1985, the petitioners called upon the Assistant Engineer of Respondent No.1 Corporation to hand over the final possession of suit plot by removing occupants and structures thereon. The Ist Variation (Final) was sanctioned by the Government of Maharashtra and it was effective from 1.5.1986 and consequently, the rights and liabilities subsisting in final Plot No.741 came to be transferred to the said plot Ist Variation. The petitioners approached the Assistant Engineer of Respondent No.1 Corporation by letter dated 12.8.1991 and requested them for peaceful and vacant possession of the said plot. This did not happen and therefore, the instant petition came to be filed.

5. The copy of the sale deed dated 29.9.1983 is on

record. A perusal of the recitals and terms and conditions therein, clearly shows that the petitioners were made aware of the existence of the tenants/encumbrances on the suit plot and petitioners purchased the said property knowing well that they had the right to collect the rent, issue receipts and earn profits without any lawful eviction. The petitioners also did not dispute that they have signed Agreements with the tenants to provide alternate accommodation. The Respondent No.1 has informed the learned advocate of the original owners that the occupants would have to be provided with alternate accommodation if they were to be evicted under Section 89 and 90 of the Maharashtra Regional Town Planning Act. Thus, the original owners were also informed by Respondent No.1 regarding the precondition of alternate accommodation to the tenants. The Agreement for Sale which has been produced by the learned counsel Petitioners also shows the existence of encroachment on the said plot. In fact, clause 12 of the Agreement for Sale clearly states that the Vendor shall on completion of the purchase put the purchasers in possession of the said land agreed to be sold by delivering vacant possession of such

portion thereof as is vacant to purchasers or their nominees and by attorning, such tenants as will be existing thereon at the time of completion. Moreover, the petitioners entered into an agreement with the tenants, which suggests beyond doubt that they were aware that they would have to provide alternate accommodation to the tenants so as to obtain vacant and peaceful possession of the suit plot.

6. It would also not be out of place to refer to affidavit-in-reply filed by Respondent No.1 and more particularly averments made in para 7 therein which read as under:-

. " I say that it is also pertinent to note that physical possession of the final plot No.741 has already been taken over by the petitioners which is evident from the fact that the petitioners are paying all the taxes in respect of the said plot inclusive of the structures of the occupants and petitioners having been

> entered into agreements with respective tenants/occupants. I say that sometime back, the petitioners have also put up a board on site stating that the land with structures standing on plot No.741 belongs to the petitioners and they are the owners/landlords of the said property. I crave leave to refer to and rely upon the photographs showing such board as and when produced. Hence, there is no question of these respondent handing over the vacant possession of the said plot to the petitioners arise at all and petition deserves to be dismissed with costs."

. The very fact that petitioners were paying taxes is also indicative of the fact that the petitioners had come in possession of the suit property.

7. There is no dispute that Respondent Nos.2 to 11 are the present occupants of the structures forming part of Mohammed Sarai Wadi. They have filed their individual affidavits and they have pointed out

that petitioners have already entered into agreements with them for providing them alternate accommodation. Respondent No.1 has stated that the petitioners have purchased suit plot knowing fully well that it was having structures standing on it and the structures were occupied by tenants. It was therefore, the petitioners' responsibility to evict these tenants and he has entered into agreements with the respective tenants/occupants. The petitioners cannot rely upon the notices issued by the Respondent No.1 on 24.9.1981 under Section 89 of the Maharashtra Regional Town Planning Act. The Corporation has further stated that when the scheme came into force on 1.3.1961 and Plot No.61 of T.P.S. (III) was exchanged with the said plot by paying compensation of Rs.3100/- to the original owner on 13.8.1966, there was no encroachment on the suit plot as per the records. As the suit plot has been subsequently encumbered with residential hutments along with commercial stall, it becomes the responsibility of the petitioners' alone to get it free from all encumbrances by providing alternate accommodation to the occupants/tenants. The learned counsel for the Petitioners submitted that it was the duty of the corporation to remove

the encroachments. In support of her submission she placed reliance on the decision in the case of **Municipal Corporation for Greater Bombay Vs. Advance Builder (I) Pvt.Ltd. reported in A.I.R. 1972 S.C.793;**

8. In the case of **Advance Builders (supra)**, the Corporation had owned the suit plot and under the approval of the State Government, scheme known as Bombay Town Planning Scheme (Santacruz VI) covering an area of 169 acres was sanctioned and the said plots were part of the same scheme. The said scheme came into force from 1.1.1959. The Corporation took no steps to remove the slum dwellers and to provide roads and drains as contemplated under the scheme and therefore, the builders had approached this Court. The Supreme Court observed that under the scheme, all the huts, sheds, stables and other temporary structures were to be removed by the Corporation. In the instant case, the Corporation claims that when the suit plot was exchanged in the year 1966, there were no hutments and they came up only after the suit plot was handed over to the original owners in the exchange. Thus, in the peculiar facts of this

case, the law laid down in the case of **Municipal Corporation for Greater Bombay Vs. Advance Builders (supra)** is not applicable.

9. The learned counsel for the petitioners also relied upon two other decisions. The first decision is of Full Bench of the Gujarat High Court in **Saiyed Mohammed Abdullamiya Uraizee (since deceased by his successor) & Ors. Vs. Ahmedabad Municipal Corporation & Ors.** reported in **1977 Gujarat Law Reporter page 549 and** the second decision is in the case of **Shankarlal Khimji Patel and another Vs. Municipal Corporation of Greater Bombay and Others** reported in **2001(4) Bom.C.R.605.** In the first case, the issue decided by the Full Bench is on the same lines as decided by this Court in Shankarlal Patel's case (supra). The Full Bench considered the scheme of Sections 53 to 55 of Bombay Town Planning Act 1955 and held that the Municipal Corporation is responsible for evicting the persons occupying any land which they are not entitled to occupy under the final scheme, in accordance with the procedure prescribed. In the instant case at the first instance, the encroachments are at a later date after the plot

was allotted and subsequently the Corporation has informed the original landlord that for evicting the occupants they are required to be rehabilitated by giving alternate accommodation by the plot owners. Therefore, the decision in the case of Full Bench does not come to the rescue of the petitioners.

10. In the second case i.e. **Shankarlal (supra),** the scheme of Section 88 of M.R.T.P.Act fell for consideration. Section 88(c) states that the planning authority shall hand over the possession of final plots to the owners to whom they were allotted in the final scheme. As noted a little while ago, it is the case of the Corporation that the suit plot was allotted in exchange to the original owners and the encroachments had come up after the plot was taken over by the original owners. Thus this decision too, does not help the petitioners.

11. In view of the above, the petition fails and is summarily rejected.

[F.I.REBELLO,J.]

[SMT.V.K.TAHILRAMANI,J.]